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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO ANTHONY GUTIERREZ,

Defendant and Appellant.

B287930

(Los Angeles County  
Super. Ct. No. VA136976)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Conditionally reversed and remanded.

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

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Sergio A. Gutierrez appeals his convictions for first degree felony murder and two counts of home invasion robbery after he and several accomplices entered his home and robbed his parents, resulting in his father's death. He claims the trial court erred and violated his constitutional rights when it admitted his pretrial confession, contending his waiver of his *Miranda*<sup>1</sup> rights was involuntary. We disagree.

However, we conditionally reverse and remand for the juvenile court to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, as amended by Proposition 57, because Gutierrez was 17 years old at the time he committed his crimes. We also direct the trial court on remand to recalculate Gutierrez's presentence custody credits.

### **PROCEDURAL BACKGROUND**

Gutierrez and one accomplice, A.E., were jointly tried before separate juries.<sup>2</sup> Following trial, Gutierrez was convicted of first degree felony murder of his father (Pen. Code, § 187, subd. (a)),<sup>3</sup> and two counts of home invasion robbery (§ 211). The jury found true a special circumstance allegation that Gutierrez committed murder in the course of a robbery. (§ 190.2, subd. (a)(17).) He was sentenced to 25 years to life.

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>2</sup> A third accomplice, J.A., was tried separately. A fourth accomplice, R.A., was committed to the California Youth Authority in 2015.

<sup>3</sup> All undesignated statutory citations refer to the Penal Code.

## FACTUAL BACKGROUND

We recite only the facts necessary to resolve the *Miranda* issue Gutierrez raises on appeal. The evidence at trial generally showed in the early morning hours of September 20, 2014, 17-year-old Gutierrez, along with accomplices A.E., J.A., and R.A., entered Gutierrez's house, attacked his parents, and robbed them. His father Sergio died after he was put in a chokehold and stabbed.<sup>4</sup> Gutierrez and J.A. were arrested around 24 hours later.

### Gutierrez's Police Interview

After his arrest, Gutierrez was interviewed by Detectives Duval and Salerno. He described at length his strained relationship with his father, his involvement in his parents' robbery, and his father's death. His account was largely consistent with the prosecution's other evidence. This video-recorded interview was played for the jury and forms the basis for Gutierrez's main argument on appeal.

Before questioning began, Duval asked Gutierrez, "You're not nervous are ya?" Gutierrez replied, "A little, not that much." The detective told him, "Nothing to worry about."

Duval said, "Before we talk to you though, you know . . . I have to advise you of your rights. Do you understand that?" Duval asked if he watched TV, and he said "hardly." Duval asked if he ever watched "cop shows and they say, you've got the right to remain silent and stuff like that?" He said, "Yeah." Duval read him his rights, and Gutierrez indicated he understood each of them.

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<sup>4</sup> We refer to Gutierrez's father as Sergio and mother as Blanca to avoid confusion.

Gutierrez described his negative relationship with his father, saying his father was “just something bad,” and they had lost trust with one another. They “went from like a little, a little problem, then it went to a big problem.” He described having physical altercations with his father, his father calling him “lazy,” and the two arguing non-stop. His father also did not like J.A. and believed he was a bad influence. When J.A. came over, his father would get “more aggressive with” Gutierrez and threaten him.

In mid-2014, Sergio removed Gutierrez’s bedroom door, at which point Gutierrez “completely stopped loving [his] dad.” Gutierrez described a physical altercation during which his father “was pushing me really bad” but Gutierrez held back from hitting him. At that point he had threatened his father in response to his father threatening him. Gutierrez admitted he had been thinking “I don’t want to do anything stupid to my parents. Like I just kept thinking should I or should I not? ‘Cause like in some point like, like I felt like I can’t hold it in no more. That my dad is just too much to me.”

He began planning the home invasion robbery a couple of days before it occurred (although he also said he had been talking about it a week prior). He discussed it first with J.A., and then with A.E. They “knew there was gonna be consequence” if they got caught. The purpose was not to kill Sergio, but to get “pay back” and “beat him up and just make—tell him like, this is for like—for you telling me all this and threatening me that you’re gonna kick my ass and stuff like that. . . . I proved to you that I have the balls more than you. But it all went wrong though.” The plan was also to steal credit cards and “stuff like that” to buy

clothes, food, and shelter. Gutierrez feared he would be homeless after the attack.

On the day before the robbery—Friday, September 19, 2014—Gutierrez got out of school and went with J.A., A.E., and two other friends to meet his girlfriend. A.E. volunteered to “take down” Sergio. Gutierrez knew if he did not incapacitate his mother, she would call the police, so they planned to spray a cloth with cologne and put it over her face, believing that would render her unconscious. J.A. agreed to do it.

Gutierrez, J.A., and A.E. went to Gutierrez’s house around 9:00 p.m. Gutierrez told his friends to wait somewhere in the neighborhood until his parents went to sleep, and he would let them in the house so they could “ambush” his parents. At around 12:30 a.m., when his parents were asleep, Gutierrez let his friends in the house. Gutierrez gave A.E. a knife from the kitchen but told him to use it only to defend himself or threaten Sergio. Gutierrez then created a ruse to get his mother to come into his bedroom, where J.A. was waiting. Gutierrez attacked her and held her down as she screamed for Sergio for help. J.A. put a cologne-soaked rag over her mouth to knock her out. As he held her, Gutierrez told her it was “payback for what my dad did and . . . payback” for taking “his side” and “defending him.”

Sergio turned on some lights and locked the front door. Gutierrez told A.E. to “take down [his] dad,” and A.E. attacked from behind with the knife. They fought, and A.E. dropped the knife, which Gutierrez picked up. Sergio grabbed the knife by the blade and fell with A.E. to the floor. As Sergio got up, he impaled himself on the knife Gutierrez was holding. Gutierrez feared his father would rush him, so he stabbed him multiple

times. A.E. put Sergio in a headlock, and he cried out for help, saying A.E. was killing him.

Gutierrez went and asked his mother for the pin code for her credit card, which she told him. A.E. released Sergio from the headlock and told Gutierrez he still had a pulse. J.A. put a blanket on Gutierrez's mother. Gutierrez took two credit cards, a small amount of cash, and a cell phone from his mother's purse, as well as some cash from a safe. Gutierrez took Sergio's car key and fled with the others in Sergio's car. They abandoned the car and went to A.E.'s residence.

Later in the day, Gutierrez, J.A., and another friend went to a mall, where Gutierrez and J.A. purchased items of clothing using Blanca's credit card. Gutierrez learned he was on the news and wanted by police. He and J.A. went to downtown Los Angeles, withdrew \$200 from an ATM machine, and tried to secure a hotel room. They ended up in Montebello, where they were arrested.

Gutierrez denied a fourth accomplice was involved in the robbery.

Toward the end of the interview, Gutierrez asked questions about how he would be treated as a minor. Salerno told him he was going to jail and could be charged with murder because Sergio died. Gutierrez was surprised about his father's death; he had been told his father was pronounced dead, but he did not believe it. Salerno said he could be tried as an adult and it was up to the district attorney to decide what charges to bring. Gutierrez indicated he understood and did not express any surprise about the information.

### *Gutierrez's Trial Testimony*

Gutierrez testified in his defense at trial. Although he acknowledged he had a “bad” relationship with his father, he otherwise contradicted most of what he said during his interview. He testified when he was with A.E. and J.A. on September 19, 2014, they did not have any conversations about committing a robbery, breaking into a house, or harming his father. He said around 11:30 that night, he heard “weird noises” outside his house. When his mother checked in his bedroom, he felt a “hand behind [his] face” and A.E. told him not to move or “this could cause your life.” A.E. threatened him if he “did not participate or if I didn’t give him money from my parents that he could end my mom’s life and my dad’s.” He believed A.E. would kill him and his parents because A.E. was with two accomplices—J.A. and R.A.

Gutierrez was “scared” and “shocked,” so he felt he had to participate in the robbery. He took the credit cards from his mother’s purse and, at A.E.’s direction, asked his mother for the PIN code. Both A.E. and R.A. had knives, and A.E. attacked Sergio. Gutierrez was unable to help because J.A. was threatening him. Still fearing for his safety, he complied with their commands to drive them away from his house. They then abandoned the car. Gutierrez was forced into some apartments as a “hiding spot,” then he was told to leave.

He did not go home or to the police. He went to the mall, but denied using his mother’s credit card to buy clothing. He eventually reconnected with J.A. and was arrested.

Gutierrez testified his statements to the detectives during his interview were false. He was scared to tell the truth in light of the perpetrators’ previous threats.

*A.E.'s Trial Testimony; Gutierrez's Rebuttal*

A.E. testified none of Gutierrez's trial testimony was true. A.E. denied breaking into Gutierrez's house or threatening him. Instead, he recounted the incident consistent with Gutierrez's statements in his interview with detectives. A.E. added that about two months prior to the crime, Gutierrez first discussed robbing his parents of \$8,000 cash he said was in the house. A.E. also testified he held Sergio down in a chokehold as Gutierrez stabbed Sergio several times in the back. A.E. wanted to call 911 for Sergio, but Gutierrez told him, "Forget about him. If you call 9-1-1, the police are gonna come and they're going to start asking questions." A.E. eventually turned himself into police.

Gutierrez retook the stand and testified A.E. was lying that Gutierrez planned the robbery and stabbed Sergio. Gutierrez also denied knowing about any cash in his parents' house.

*Detective Duval's Rebuttal Testimony*

In the prosecution's rebuttal, Detective Duval testified he administered *Miranda* rights to Gutierrez before his interview and made no promises to get him to speak. During the interview, Gutierrez freely explained he planned the crimes and never said he was forced to do anything on the night of the robbery. Duval testified officers recovered \$15,000 in cash from Gutierrez's parents' bedroom.

Duval interviewed A.E. after he turned himself in. A.E.'s statements were basically consistent with his testimony at trial.

**DISCUSSION**

**I. Gutierrez's *Miranda* Waiver Was Voluntary and Properly Admitted At Trial**

Gutierrez contends the trial court erred and violated his constitutional rights by admitting his custodial interview with



police because his *Miranda* waiver was involuntary based on three facts: (1) he was 17 years old at the time with no experience with the criminal justice system; (2) the detectives employed coercive tactics by reassuring him he had “nothing to worry about”; and (3) he did not have the opportunity to consult with an adult and was instead told his mother was on his side and wanted him to speak to police. We find no error.

Standard of Review

Gutierrez did not expressly waive his *Miranda* rights, but “ ‘he did so implicitly by willingly answering questions after acknowledging that he understood those rights.’ ” (*People v. Nelson* (2012) 53 Cal.4th 367, 375.) “To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary.” (*Id.* at pp. 374–375.) A court must evaluate the defendant’s state of mind and “ ‘all the circumstances surrounding the interrogation.’ [Citation.] When a juvenile’s waiver is at issue, consideration must be given to factors such as ‘the juvenile’s age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.’ ” (*Id.* at p. 375.) When reviewing the trial court’s decision to admit a confession, “ ‘we accept the trial court’s determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*.’ ” (*People v. Lessie* (2010) 47 Cal.4th 1152, 1169.)

### Procedural Background

Before trial, Gutierrez moved to suppress his interview with detectives “as involuntary based on an implied promise.” At a hearing on the motion, the prosecutor played for the court the first portion of the video-recorded interview, during which Duval asked Gutierrez if he was nervous and told him he had “[n]othing to worry about.” After Gutierrez acknowledged he was familiar with the recitation of a suspect’s rights on “cop shows,” Duval read him his rights, which Gutierrez indicated he understood.

Gutierrez testified he was interviewed in a different room before the interview on the recording. According to him, in this first interview—which was not recorded—the same detectives “told me that they talked to my mom, that it was fine, that I could talk, that she was on my side, that everything would be fine. And they never read me my rights.” Gutierrez interpreted their assurance in this first interview and later on the video recording as “false promise[s].” He claimed he would not have otherwise spoken to the detectives, and he believed he would be leaving the same day. It was the first time he had ever been arrested or read his *Miranda* rights.

On cross-examination, Gutierrez said he learned of his father’s death in the first interview. He said in that interview the detectives “went straight to the point. They said that, ‘Oh, we went to go visit your mom at the hospital, that she said that it’s fine that you could talk to us.’ And they said, ‘There’s nothing to worry about.’ So that’s where I was, like, ‘Okay.’” He acknowledged during the recorded interview the detectives never mentioned “immunity” or “leniency,” and they never threatened him, although he felt “persuaded.” He also acknowledged during

the portion of the recorded interview when he talked about possibly going to jail, he never said he thought he was going home.

Before hearing argument from counsel, the court confirmed Gutierrez never said during the recorded interview he believed he could go home or would get immunity or leniency. The prosecutor argued he had been surprised to hear of the existence of this first interview. He did not know “if this occurred or if Detective Duval or Salerno would give a different account,” but if the court needed their testimony, the court would have to reserve ruling. In any case, the prosecutor argued there was “zero evidence” from the recorded interview to show Gutierrez’s free will was overcome, even believing his testimony about the first interview. He pointed out Gutierrez first brought up the possibility of going to jail. Defense counsel argued the detectives made an implied promise at the start of the recorded interview when they told Gutierrez there was “[n]othing to worry about,” especially because Gutierrez was a minor.

In finding the prosecution showed by a preponderance of the evidence that Gutierrez’s statements were voluntary, the court explained: “[E]ven if this court was to accept Mr. Gutierrez’s representation that a full-[blown] interview took place ahead of time, none of that is born[e] out in the course of his interview subsequent to *Miranda*. So assuming *arguendo* that they questioned him with some degree of specificity before they actually mirandized him, which I find no infirmity with the nature of *Miranda*, the fact that he indicated he understood the *Miranda* advisement and he agreed to speak and continued to speak, and the fact that, in the course of the subsequent interview, he never mentions, ‘Hey, what about this? I thought

you said I was going to go home.’ Or what about this? ‘You know, I thought you weren’t going to lie to me. I thought I wasn’t going to be in any kind of trouble, that this was going to be okay.’ There’s nothing to suggest in this subsequent interview—anything about the subsequent interview that is corroborative of the defendant’s comment that he was under the false impression that he—they had gave him some promise of immunity or leniency, anything along those lines, nothing about his subsequent interview suggests that. [¶] Even assuming arguendo that he was given a pre-interview, that does not overbear or does not overcome the fact that he was properly *Mirandized*. It would not have overcome his voluntariness of his statement or his free will. [¶] I viewed the video. It does not appear to be a coercive environment by [any] means. As a matter of fact, he’s not even cuffed. [¶] And so this court is going to go ahead and find that the statement is voluntary and find that the *Miranda* was properly administered, and the defendant’s statement will come in.”

#### Analysis

Consistent with the trial court’s reasoning, we will accept Gutierrez’s testimony he was interviewed in an unrecorded session prior to the recorded interview. Like the trial court, we find nothing to suggest his *Miranda* waiver during the recorded interview was in any way involuntary or coerced.

Gutierrez was 17 years and three months old at the time of the interview, close to the age of majority. There was no evidence he suffered from any mental defect, and he expressed no confusion or hesitation when he was read his rights, acknowledging he understood each of them. When asked if he was nervous, he responded, “A little, not that much.” The trial

court noted the video recording of the interview did not reflect any sort of coercive environment. Likewise, the transcript of the interview does not suggest any coercion, but rather it demonstrates Gutierrez spoke freely about the robbery. While Gutierrez had never been arrested or read his *Miranda* rights before, he acknowledged he was familiar with them. His questions at the end of the interview about potential charges, jail time, and his status as a minor demonstrated a level of maturity and sophistication about the consequences of his crimes.

Gutierrez suggests the detectives used “coercive” tactics both before and during the recorded interview by telling him he had “[n]othing to worry about” and he would be allowed to leave. Even if these statements could be considered in some way coercive, the transcript of the recorded interview belies any suggestion they rendered his *Miranda* waiver involuntary. Gutierrez did not mention during the interview he was promised he could leave; to the contrary, he must have anticipated facing charges because he asked about how he would be treated as a minor. He also expressed no surprise when he was told he could be charged as an adult and could go to jail. At the suppression hearing he testified he was never promised any immunity or leniency and was never threatened. Instead, he felt “persuaded,” which did not overcome the evidence of voluntariness reflected in the recorded interview.

Gutierrez also claims the detectives “leveraged [his] relationship with his mother to persuade him to waive his right to silence,” pointing to his testimony that detectives told him they had talked to his mother who was “on his side” and said it was

“fine” to talk to them.<sup>5</sup> Again, this statement does not overcome the evidence from the recorded interview showing he voluntarily waived his *Miranda* rights. His mother’s statement it was “fine” for Gutierrez to speak with the detectives was at best weak encouragement to waive his right to remain silent, and his statements during the interview reflected a mature, informed waiver of his rights regardless of this assurance.<sup>6</sup> The prosecution carried its burden to show by a preponderance of the evidence that his waiver was voluntary, so his interview statements were properly admitted.

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<sup>5</sup> At one point in his recorded interview, Gutierrez said, “I don’t know if she talked to you guys,” referring to his mother. Duval responded, “Not yet, ‘cause she’s been really distraught.” Later in the interview, Duval said he had lied to Gutierrez and the detectives had talked to his mother. These comments strongly undermine Gutierrez’s testimony at the suppression hearing that the detectives told him they had spoken with her. The trial court did not make a credibility finding, so we merely note this inconsistency.

<sup>6</sup> Gutierrez argues his mother’s statement was particularly problematic because she had a conflict of interest. For support, he cites a dissent from an order denying certiorari in *Little v. Arkansas* (1978) 435 U.S. 957. A dissent from the denial of certiorari has “no binding or precedential value,” so we decline to rely on it. (*In re I.F.* (2018) 20 Cal.App.5th 735, 764.) In any case, “a juvenile *Miranda* waiver will be evaluated under the totality of the circumstances, regardless of the presence or absence of an adult.” (*Id.* at p. 765.) As we have explained, the totality of the circumstances showed Gutierrez’s waiver was voluntary despite any statement from his mother that it would be “fine” to speak with the detectives.

## II. Gutierrez Is Entitled to a Juvenile Transfer Hearing

When Gutierrez was charged in February 2016, the prosecutor was permitted to file the charges against him directly in adult criminal court even though he was a juvenile at the time of his crimes. That changed with Proposition 57, which went into effect on November 9, 2016, after Gutierrez was tried and convicted but before he was sentenced. “Proposition 57 prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct what we will call a ‘transfer hearing’ to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult. (See Welf. & Inst. Code, § 707, subd. (a).)” (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303 (*Lara*).)

On July 20, 2017—after Proposition 57 was enacted but before *Lara* was decided and Gutierrez was sentenced—defense counsel moved for a juvenile transfer hearing. The trial court denied the motion, finding Proposition 57 did not apply because Gutierrez was charged before its enactment. The court also denied a motion for reconsideration. Gutierrez was sentenced on January 31, 2018. He filed a notice of appeal the same day.

On February 1, 2018, the California Supreme Court decided *Lara*, holding Proposition 57 applied to all juveniles charged directly in adult court whose convictions were not final when Proposition 57 was enacted. (*Lara, supra*, 4 Cal.5th at p. 304.) On April 30, 2018, Gutierrez filed a petition to “recall” his sentence and remand his case to juvenile court. The court held a

hearing on June 29, 2018. According to a minute order, the court noted *Lara* had been decided and ruled Gutierrez’s “conviction is conditionally reversed in order to transfer the matter to juvenile court [for a juvenile transfer hearing].” The trial court set the transfer motion hearing in the juvenile court for July 20, 2018. There is no indication in the record before us whether that hearing has taken place.

Respondent suggests the trial court’s order is likely invalid because it was issued more than 120 days after Gutierrez’s sentencing. (See § 1170, subd. (d) [trial court “may, within 120 days of the date of commitment on its own motion . . . recall the sentence and commitment previously ordered and resentence the defendant”].) Respondent’s argument misses the mark. By its terms, section 1170 permits a trial court to *recall* a defendant’s sentence and conduct a resentencing. Although Gutierrez filed a petition to “recall” his sentence, the trial court did not recall his sentence and resentence him; it conditionally *reversed* his conviction in response to *Lara*.

However, both the trial court’s order and any juvenile transfer hearing held at the direction of the trial court were void because Gutierrez had filed his notice of appeal, which divested the trial court of jurisdiction. With limited exceptions not applicable here, “[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.” [Citations.] This rule protects the appellate court’s jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration. [Citations.] As a result of this rule, the trial court lacks jurisdiction to make any order affecting a judgment, and any action taken by the trial court while the appeal is



pending is null and void.” (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923.) Certainly, conditionally reversing Gutierrez’s conviction affects the judgment, so both the order and any resulting juvenile transfer hearing were void.

We are disinclined to require a court to expend resources conducting potentially duplicative work. But the parties agree, as do we, that Gutierrez is entitled to a juvenile transfer hearing. If a hearing has been held, it was invalid. So, we will conditionally reverse Gutierrez’s conviction and order the juvenile court to conduct a valid juvenile transfer hearing pursuant to Proposition 57 following remittitur.

The court in *Lara* endorsed the disposition reached in *People v. Vela* (2018) 21 Cal.App.5th 1099 (*Vela*), which provided the following instructions to the trial court following remand from the California Supreme Court: “Here, under these circumstances, Vela’s conviction and sentence are conditionally reversed and we order the juvenile court to conduct a juvenile transfer hearing. ([Welf. & Inst. Code,] § 707.) When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer Vela’s cause to a court of criminal jurisdiction. ([Welf. & Inst. Code,] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines it would have transferred Vela to a court of criminal jurisdiction because he is ‘not a fit and proper subject to be dealt with under the juvenile court law,’ then Vela’s convictions are to be reinstated. ([Welf. & Inst. Code,] § 707.1, subd. (a).) The court is to resentence Vela consistent within the bounds of its discretion as discussed within the following section of this opinion [dealing with firearm

enhancements]. On the other hand, if the juvenile court finds that it would *not* have transferred Vela to a court of criminal jurisdiction, then it shall treat Vela’s convictions as juvenile adjudications and impose an appropriate ‘disposition’ within its discretion.” (*Vela, supra*, at p. 1113; see *Lara, supra*, 4 Cal.5th at p. 310; see also *People v. Phung* (2018) 25 Cal.App.5th 741, 762 [adopting same instructions].) We will echo these instructions as part of the disposition of this case to provide guidance to the juvenile court in conducting a valid transfer hearing on remand.

### **III. The Trial Court Should Recalculate Presentence Custody Credits**

Gutierrez was granted 572 days of custody credits, and he contends he should have been granted an additional 657 days, for a total of 1,229 days of custody credits. His contention appears correct—he was arrested on September 21, 2014 and was sentenced on January 31, 2018, a duration of 1,229 days. (See § 2900.5, subd. (a) [credit accrues for “any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution”].) But on this record, we decline to correct the judgment to add custody credits and instead direct the trial court to recalculate them on remand.<sup>7</sup>

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<sup>7</sup> While this appeal was pending, Gutierrez’s appellate counsel moved the trial court to correct his credits. The trial court declined to recalculate the credits because the case had been transferred to juvenile court.

### **DISPOSITION**

The judgment is conditionally reversed. We remand the matter to the juvenile court with directions to conduct a transfer hearing as discussed in this opinion, no later than 90 days from the filing of the remittitur. If at the transfer hearing the juvenile court determines it would not have transferred Gutierrez to a court of criminal jurisdiction, then his criminal convictions will be deemed juvenile adjudications as of this date. The juvenile court should then conduct a dispositional hearing within its usual time frame.

If the juvenile court determines at the transfer hearing it would have transferred Gutierrez to a court of criminal jurisdiction, then the judgment shall be reinstated as of that date. The trial court is directed to recalculate Gutierrez's presentence custody credits. If the court awards additional credit, it is directed to issue an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

BIGELOW, P. J.

We concur:

STRATTON, J.

WILEY, J.